

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

**RODNEY ELLIOTT and ADVANCED
COMMUNICATIONS, INC.,**

Plaintiffs,

vs.

**TRAVIS MITCHELL, STEPHANIE
ADAMS and KATHY LEMMER,**

Defendants.

Case No. CI01-52

INTERLOCUTORY ORDER ON MOTION FOR SUMMARY JUDGMENT

DATE OF HEARING: May 13, 2002.

DATE OF RENDITION: July 31, 2002.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

APPEARANCES:

For plaintiffs: Larry W. Buecke.

For defendants:

Mitchell: No appearance.

Adams & Lemmer: James D. Gotschall.

SUBJECT OF ORDER: Motion of defendants Breiner (formerly Adams) and
Lemmer for summary judgment.

PROCEEDINGS: See journal entry rendered contemporaneously with
hearing.

FINDINGS: The court finds and concludes that:

1. The defendants, Stephanie Breiner (Breiner) and Kathy Lemmer (Lemmer), move for summary judgment. Breiner is the current name of defendant Adams, who married after this action commenced. The action has been dismissed as against the defendant Travis Mitchell (Mitchell) due to arbitration proceedings involving the claim against Mitchell.

2. The amended petition purports to state four causes of action in tort. The first cause of action is the individual claim of plaintiff Rodney Elliott (Elliott) for tortious

interference with a business relationship or expectancy. The second cause of action is the claim of plaintiff Advanced Communications, Inc. (Advanced) for tortious interference with a business relationship or expectancy. The third cause of action purports to state a claim for civil conspiracy regarding Elliott's claim. The fourth cause of action purports to state a claim for civil conspiracy regarding Advanced's claim.

3. In proving conspiracy to tortiously interfere with a business relationship, a claim of civil conspiracy is not actionable in itself, but serves to impose vicarious liability for the underlying tort of those who are a party to the conspiracy. *Koster v. P & P Enters., Inc.*, 248 Neb. 759, 539 N.W.2d 274 (1995); *Upah v. Ancona Bros. Co.*, 246 Neb. 585, 521 N.W.2d 895 (1994). Thus, what the amended petition states as a third cause of action constitutes in law merely a theory of vicarious liability relating to Elliott's claim in the first cause of action. Similarly, the asserted fourth cause of action constitutes a theory of vicarious liability relating to Advanced's claim in the second cause of action.

4. A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means. *Koster v. P & P Enters., Inc.*, *supra*; *Wiekhorst Bros. Excav. & Equip. v. Ludewig*, 247 Neb. 547, 529 N.W.2d 33 (1995). A civil conspiracy need not be established by direct evidence of the acts charged, but may, and generally must, be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purpose to be accomplished. *Koster v. P & P Enters., Inc.*, *supra*; *Davidson v. Simmons*, 203 Neb. 804, 280 N.W.2d 645 (1979).

5. The elements of tortious interference with a business relationship or expectation are (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was

disrupted. *Koster v. P & P Enters., Inc.*, *supra*; *Wiekhorst Bros. Excav. & Equip. v. Ludewig*, *supra*.

6. The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled, and thus resolve, without the expense and delay of trial, those cases where there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, and where the moving party is entitled to judgment as a matter of law. *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000).

7. In *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (2000), the Nebraska Supreme Court restated the familiar principles applicable to motions for summary judgment:

a. Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving] party is entitled to judgment as a matter of law.

b. In considering a summary judgment motion, the court views the evidence in a light most favorable to the nonmoving party and gives such party the benefit of all reasonable inferences deducible from the evidence.

c. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.

d. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

e. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.

f. After the moving party makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

8. The evidence shows a total void as to Elliott's claim for mental and emotional stress and anxiety, inconvenience and humiliation, and loss of reputation. Breiner and Lemmer met their burden to produce enough evidence to demonstrate that they would be entitled to judgment as a matter of law on these claimed damages if the evidence was uncontroverted at trial. The burden shifted to Elliott to produce evidence showing the existence of a material issue of fact on these claimed damages. Elliott failed to do so.

9. Elliott's claim for lost wages also fails as a matter of law. Viewed in the light most favorable to Elliott, the lost wages necessarily followed from Breiner's and Lemmer's severance of employment with Advanced. An employment contract with no fixed term may be terminated at any time by either the employer or the employee, at her own pleasure. *Stewart v. North Side Produce Co.*, 197 Neb. 245, 248 N.W.2d 37 (1976). Thus, whatever the discussions may have been between Mitchell, Breiner, and Lemmer prior to the severance of employment, Breiner and Lemmer have no legal responsibility for Elliott's allocation of time between his business and his short-term employment in the Kansas City area.

10. Thus, as to Elliott's claim in the first cause of action and the theory of vicarious liability in what is asserted as a third cause of action, the motion should be granted.

11. As to Advanced's claim in the second cause of action and the theory of vicarious liability in what is asserted as a fourth cause of action, the court concludes that there is a genuine issue of material fact or as to the ultimate inferences that may be drawn from those facts. Accordingly, that part of the motion must be denied, except to determine that the purported fourth cause of action constitutes only a theory of vicarious liability on Advanced's claim set forth in the second cause of action.

12. Because this order does not dispose of all claims of all parties, it is interlocutory in character and does not constitute a final order. NEB. REV. STAT. § 25-1315 (Cum. Supp. 2000). The interlocutory determinations made herein are subject to revision at any time before the entry of judgment adjudicating all of the claims and the rights and liabilities of all parties. *Id.*

ORDER:

IT IS THEREFORE ORDERED that:

1. The motion of defendants Breiner and Lemmer for summary judgment is granted to the extent set forth below and otherwise denied.

2. Upon entry of final judgment, the claims of plaintiff Elliott in the first cause of action and the theory of vicarious liability in what is asserted as a third cause of action shall be dismissed with prejudice at plaintiff Elliott's cost.

3. The asserted fourth cause of action constitutes a theory of vicarious liability on plaintiff Advanced Communications, Inc.'s claim in the second cause of action, and shall be subject to trial as part of the second cause of action. Because of the interlocutory dismissal in paragraph 2 above, the second cause of action is the sole cause of action for trial.

4. The matter is assigned for final pretrial conference on **Monday, September 9, 2002**, at **1:55 p.m.**, or as soon thereafter as the same may be heard (currently, number four in line for pretrial conferences that begin at 1:30 p.m. on that date). All other provisions of the progression order regarding location and conduct of the final pretrial conference remain fully operative.

5. This order is interlocutory in character and does not constitute a final order. This order, including any dismissal recited herein, remains subject to revision at any time before the entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties.

Signed in chambers at Ainsworth, Nebraska, on July 31, 2002.
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

☒ Mail a copy of this order to all counsel of record and to any pro se parties.

Done on _____, 20____ by _____.

☐ Enter judgment on the judgment record.

Done on _____, 20____ by _____.

☐ Mail postcard/notice required by § 25-1301.01 within 3 days.

Done on _____, 20____ by _____.

☒ Note the decision on the trial docket as: [date of filing] Signed "Interlocutory
Order on Motion for Summary Judgment" entered.

Done on _____, 20____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge